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NO:

in the
Supreme Court
of the
United States

OCTOBER TERM, 1981

ARTHUR YOUNG & COMPANY,

Petitioner,

vs.

ROGER L. SUMMER,

Respondent.

RESPONDENT'S BRIEF IN OPPOSITION TO WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

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QUESTION PRESENTED FOR REVIEW

Whether, pursuant to 28 U.S.C. § 1254(1), the Supreme Court should exercise its discretion to assert jurisdiction over a matter involving the longstanding and universally accepted practice of requiring district courts to try the merits of claims based upon Federal securities regulation rather than to allow dismissal pursuant to F.R.C.P. 12(b)(6), where the complaint raises genuine issues of fact in regard to the federal equitable tolling doctrine and plaintiff's exercise of due diligence in the pursuit of federally created rights and where defendants have concealed their (alleged) fraudulent activities.

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The trial court in the instant case, United States District Court for the Southern District of Florida, Judge Jose A. Gonzalez, Jr., presiding, granted Defendant's Motion to Dismiss for failure of Plaintiff to state a claim for which relief can be granted by Order dated May 2, 1979. (See Appendix B, Brief for Arthur Young & Company, p.12a). The trial judge followed the procedure set forth in Azalea Meats, Inc. v. Muscat for determining when the clock starts to run for the purpose of applying a borrowed state statute of limitations to a federally created cause of action. Appendix B, 13a citing 386 F.2d 5 (5th Cir. 1967). Furthermore, the trial judge stated the rule announced by the Fifth Circuit in Aboussie v. Aboussie, that "the statute of limitations in 10(b) actions begins to run from the time a person has actual knowledge or notice of facts which, in the exercise of due diligence, would have led to actual knowledge of the violation." (Appendix B, p.13a, citing Aboussie, 441 F.2d 150 (5th Cir. 1971).

However, the trial judge erroneously decided that application of the equitable tolling doctrine of fraudulent concealment as developed in Klein v. Bower, 421 F.2d 338 (2d Cir. 1970) was not warranted in the instant case because Summer did not exercise due diligence or care in discovery of facts which would have put him on notice of facts constituting fraud. Thus, the Fifth Circuit reversed the trial judge's erroneous decision that Summer's § 17 (Securities Act of 1933), Rule 10(b) and Rule 10(b)(5) (Securities Exchange Act of 1934) claims were time barred by the respective limitation provisions, "borrowed" from analogous Florida Statutes. (Appendix B, pp.13a-14a, citing Klein v. Bower, and Berry Petroleum v. Adams & Peck, 518 F.2d 401, at 412 (2d Cir. 1975).

The Fifth Circuit affirmed the trial court's decision that Summer's claims under § 11 and § 12(b) of the Securities Act were absolutely barred under that Act's express statute of limitations provision, but reversed the trial court's decision that Plaintiff Summer did not allege facts sufficient to toll the applicable state statute of limitations in regard to his § 10(b) and § 17 claims. Summer v. Land & Leisure, Inc., 664 F.2d 965 (5th Cir. 1981). The court reviewed the three facts the trial court found dispositive: (1) Summer's knowledge that Land & Leisure did not hold annual shareholder meetings; (2) that Land & Leisure failed to send out annual shareholder reports; and (3) Summer's knowledge of the price decline of Land & Leisure

shares. Id., at 969. After disposing of the Defendant's arguments, the Fifth Circuit held "the three facts relied upon by the district court are simply not sufficient to justify" a Rule 12(b)(6) dismissal. Id., at 970, as against all Defendants but Arthur Young & Company and Raymond James & Associates.[1]

Since the enactment of the Federal Rules of Civil Procedure, the various Circuits have consistently reversed judgments which result in final determination on mere pleading allegations alone. Sparks v. England, 113 F.2d 579 (8th Cir. 1940).[2] The proper test for determining whether dismissal or summary judgment is warranted in a particular case is whether there exists a dispute as to material facts upon which plaintiff can conceivably succeed, and not the likelihood of plaintiff's success. In a case involving the affirmative defense of a Pennsylvania statute of frauds, the Third Circuit reversed the district court's dismissal pursuant to Rule 12(b)(6); the Court reiterated the limited role of demurrer under the Federal Rules of Civil Procedure:

> "No matter how unlikely it may seem that the pleader will be able to prove his case, he is entitled, upon averring a claim, to an opportunity to try to prove it." Continental Collieries, Inc. v. Shober, 130 F.2d 631, at 635 (3d Cir. 1942).

Similarly, the Eighth Circuit stated that:

> "there is no justification for dismissing a complaint for insufficiency of statement, except where it appears to a certainty (sic) that the plaintiff would be entitled to no relief under any set of facts which could be proved in support of the claim." Leimer v. State Mutual Life Assurance Co., 108 F.2d 302, at 306 (8th Cir. 1940).

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[1]The Fifth Circuit granted Summer leave to amend as to these Defendants, determining that Summer's complaint did not, as to these Defendants, allege sufficient facts to invoke the equitable doctrine of tolling. Id., at 970-71.

[2]Note 1, supra.

In reversing the trial court in this case, the Fifth Circuit pointed out the judicial preference for reserving to the jury questions of fact in regard to plaintiff's due diligence as required under the equitable tolling doctrine. Summer, supra, at 970, citing Azalea Meats, Inc. v. Muscat, 386 F.2d 5 (5th Cir. 1967). In order to be entitled to a dismissal under F.R.C.P. 12(b)(6), defendants were required to show "beyond doubt that plaintiff can prove no set of facts in support of his claim which would entitle him to relief," Id., at 970, citing Conley v. Gibson, 335 U.S. 45-46, 78 S.Ct. at 101-02. The Fifth Circuit stated that several factual situations in which the decline in the price of Land & Leisure stock "would not be indicative of fraud in the least, e.g., a depressed real estate market caused either by tight money or recession." Id., at 969. The Fifth Circuit pointed out the inconsistency in Defendant Arthur Young & Company's argument that the decline in price of Land & Leisure stock did or should have put the reasonable investor on notice of some type of fraud, in that Arthur Young, Land & Leisure's accounting firm, itself was not put on notice by the drop in price of its client's stock. Id.

Neither Land & Leisure's failure to hold annual shareholder meeting nor its failure to send reports thereof were "sufficient to put an investor on notice of facts which in the exercise of due diligence would have led to actual knowledge of fraud." Id.[3] The Court distinguished Cook v. Avien, Inc., 573 F.2d 685 (1st Cir. 1978) in which a shareholder meeting was in fact held. No shareholder meeting from which Summer could have been put on notice as to Defendant's fraudulent activities was held in the instant case. However, implicit in the Fifth Circuit's statement of the correct rule in Cook, i.e., "the failure to attend [shareholder meetings] was one factor to be weighed adversely to plaintiff's diligence," Id., at 969, note 3, is the Fifth Circuit's approval of the cumulative approach to the factors bearing upon the issue of due diligence. In light of the Fifth Circuit's explicit and exhaustive analysis of the factors which Defendant contends add up to notice of injury and lack of due

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[3]Defendant erroneously argues that the revised provision of Florida's Corporation Code, F.S. 607.084, required Land & Leisure to hold shareholder meetings. F.S. 607.084 did not become effective until January 1, 1976.

diligence, Defendant Arthur Young's contention that the Court erroneously considered the relevant factors disjunctively, rather than conjunctively, is clearly without merit. (Arthur Young's Brief, p.11). The Fifth Circuit merely held that given the totality of the facts presented to the trial court, Defendants were not entitled to a dismissal as a matter of law.

The cases upon which Defendants rely can be distinguished on their respective facts. In Berry, unlike the instant case, facts supporting a decision for defendant appeared in the complaint. Berry Petroleum Co. v. Adams & Peck, 518 F.2d 402 (2d Cir. 1975). Plaintiff's argument in Berry that plaintiff could not have known about the corporation's financial difficulties was negated by the fact that a proxy statement was circulated. Id., at 410, note 9. Moreover, Berry is contrasted with the instant case by the direct action taken by the SEC in suspending trade in the corporation's stock. Id. Summer did not have the benefit of a publicized consent order secured by the SEC nor notice of prior private actions brought against the Defendant on substantially similar facts, as in Berry, since his was the first suit to be brought against the Defendant. Id., at 410. Especially noteworthy in distinguishing Berry from the instant case is that res judicata provided alternative grounds for summary disposition as to all but four class members. Id., at 411.

Likewise, the publication of earlier suits against the defendants involving the same transactions in State of Ohio v. Peterson, et al., 651 F.2d 687, at 689-90 (10th Cir. 1981), distinguishes it from the instant case. Furthermore, plaintiff's delay in bringing suit in Peterson was attributable to the Attorney General's admitted negligence and apathy. Id., at 691. The Tenth Circuit in Peterson reaffirmed the "continuing vitality of the Holmberg procedure in which federal courts borrow a state limitations period as a matter of judicial convenience." Id., at 691. The Court also limited the holding in Board of Regents v. Tomanio, barring a federal judge from exercising equitable power to toll the limitations period where the borrowed state statute contained no provision for tolling under the circumstances presented, to the civil rights provisions of Title 18 and Title 42, U.S. Code. Id., at 691, citing Board of Regents v. Tomanio, 446 U.S. 478, 100 S.Ct. 1790 (1980). Thus, the Tenth Circuit reaffirmed the Eaplin rule, wherein federal law controls the tolling of a limitations period borrowed

from state law. Id., at 691, citing Esplin v. Hirsche, 402 F.2d 94, at 104 (10th Cir. 1968), cert. den. 394 U.S. 928, 89 S.Ct. 1194 (1969).

The Tenth Circuit's opinion upholding summary disposition of a 10(b) claim on the particular facts of the case is enlightening for its tracing of the development of equitable tolling. Id., at 692-93, citing Bailey v. Glover, 21 Wall. (88 U.S.) 342 (1875) and Holmberg v. Armbrecht, 327 U.S. 392, 66 S.Ct. 582 (1946). The Tenth Circuit expounded two lines of cases, the first in which summary disposition was unwarranted and the second where summary disposition was warranted. The cases cited were determined on their particular facts and no one factor predominates in determining under which category of cases a particular case falls. While the Tenth Circuit in Peterson concluded that the facts there justified summary disposition, supra, the cases supporting that decision are distinguished from the instant case. Id., at 692, note 9.

The federal rules, which are liberal in regard to pleadings, provide the proper procedure for district courts faced with a complaint it determines insufficiently states a claim, i.e., a dismissal with leave to amend. Wolford v. Equity Resources, 424 F.Supp. 670 (S.D. Ohio 1976). Thus, where a plaintiff's complaint alleging violation of Fair Labor Standards Act 29 U.S.C.A. § 201 failed to show that plaintiffs were employed in commerce or for production of goods for commerce, and plaintiffs were apparently excepted from the provisions of § 135 of the Act, dismissal was held inappropriate. DeLoach v. Crowleys, Inc., 128 F.2d 378 (5th Cir. 1942). Further, the Fifth Circuit has consistently upheld the rule followed by the various Circuits that such cases are generally to be tried on the merits. Id., at 379.

CONCLUSION

Contrary to the factual situation in Peterson, it cannot be said of the instant case that Summer "slept on his rights." Rather, Plaintiff Summer took affirmative action, inter alia, bringing suit against Land & Leisure to force disclosure, supra. The law does not require an aggrieved party to have proceeded from the outset as if he were dealing with thieves. Hudak v. Economics Research Analysists, Inc., 499 F.2d 966, at 1002 (5th Cir. 1974). Given the factors enumerated in Azalea Meats, Inc., 386 F.2d at 9, the "artfully concealed" and "convincingly practiced" fraud perpetrated upon Summer, the fraudulent concealment thereof together with the presence of fiduciary relationship the defendants owed him as a shareholder, at the very least, raised questions of fact sufficient to entitle Summer to his day in court and to an adjudication of his cause on the merits.

DATED May 25, 1982.

Respectfully submitted,

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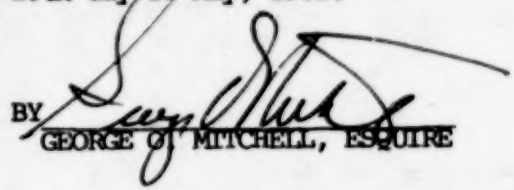
BY _____
GEORGE O. MITCHELL, ESQUIRE

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the above and foregoing was furnished by mail to CARL D. LIGGIO, ESQUIRE, and EUGENE R. ERBSTOESSER, ESQUIRE, Arthur Young & Company, 277 Park Avenue, New York, New York 10172 and PODHURST ORSECK PARKS JOSEFSBERG EATON MEADOW & OLIN, P.A., 1201 City National Bank Building, 25 West Flagler Street, Miami, Florida 33130, on this 25th day of May, 1982.

BY 
GEORGE O. MITCHELL, ESQUIRE